North Dakota Law Review

Volume 39 | Number 2 Article 1

1963

Reasonable Searches

Paul C. Matthews

REASONABLE SEARCHES

PAUL C. MATTHEWS*

One of the most cherished and jealously guarded rights of mankind is the right to privacy — the right to be let alone. Constitutional recognition of that right is found in The Fourth Amendment of the United States Constitution[1] and in Section Eighteen of the Constitution of North Dakota.[2] Both of these constitutional provisions prohibit unreasonable searches and limit search by warrant to those warrants issued upon probable cause supported by oath or affirmation, which describe with particularity, the place to be searched, and the persons or things to be seized.

A search is a violation of the right to privacy. It involves either an exploration, an invasion, a quest, a prying into hidden places or a searching out.[3] More than the ordinary use of the senses is required for a search, with the result, in most cases, of a trespass either to the person or to property.[4] It can not be said that there has been a search when the items are in plain view of the officer.[5]

SEARCH WARRANTS

A search is reasonable when it is made pursuant to a

---

*A.B., University of Missouri; J.D., University of Chicago; Professor of Law, University of North Dakota.

1. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly discribing the place to be searched, and the persons or things to be seized." U.S. Constitution Amendment IV.

2. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall be issued but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." North Dakota Constitution Article 1 § 18.

3. In People v. Bouchard, 326 P.2d 646 (1958) where the court held that there was no search and seizure when a pair of brass knuckles were disclosed as the result of the officer's looking under the mattress on a bed, the court cited the case of People v. West, 144 Cal. App. 2d 214, 219, 300 P.2d, 729, 733, and approved the following language from the opinion in that case with respect to the definition of a "search": ". . . the term implies some exploratory investigation or an invasion and quest, a looking for or seeking out. . . . a search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. . . . it is generally held that a mere looking at that which is open to view is not a 'search'." See also State v. Hawkins, 240 S.W.2d 688, 692 (Mo. 1951), McDonald v. U.S. 335 U.S. 451, 69 Sup. Ct. 191 (1948).

4. McDonald v. U.S., 335 U.S. 451, 69 Sup. Ct. 191 (1948).

5. It was said by the Court in People v. Brooks, 316 P.2d 435 (Cal. 1957) that seeing cases of whiskey on the back seat of a car by looking

valid search warrant.[5] [1] Such a warrant is defined by the North Dakota Code[6] as being an order in writing, made in the name of the State of North Dakota signed by a magistrate, and directed to a peace officer, commanding him to search for personal property and bring it to the magistrate. In North Dakota a search warrant may be issued only when property has been stolen or embezzled, has been used to commit a felony, or is in the possession of any person with the intent to use it for the purpose of committing a public offense.[7] A search warrant may be issued under federal law[8] when property has been stolen, or embezzled, or has been used, as the means of committing a crime, or is possessed, controlled or designed or intended for use, or has been used in the violation of law in aid of any foreign government.[9]

A search made either with a search warrant or as an incident to a lawful arrest is not reasonable when it is made for merely evidentiary material. In order to be

---

through the window is not a search. In the People v. Exum, 47 N.E.2d 56 (Ill. 1943) where the officer observed items in full view and plainly discernible upon the back seat of an automobile, in the ray of his flashlight, the court said: "It is not a search to observe that which is open and patent in either sunlight or artificial light."

1. Gouled v. U.S., 255 U.S. 298, 41 Sup. Ct. 261 (1920).

6. N. D. Cent. Code § 29-29-01 (1961).

7. "Grounds for issuance of search warrant. A search warrant may be issued upon any of the following grounds:

"1. When property is stolen or embezzled, it may be taken on a search warrant from any house or place in which it is concealed, or from the possession of the persons by whom it was stolen or embezzled, or of any other person in whose possession it may be;

"2. When it was used as the means of committing a felony, it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or of any other person in whose possession it may be;

"3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered it may be taken on the warrant from such person, or from a house or other place occupied by him or under his control, or from the possession of the person to whom he may have delivered it."

N. D. Cent. Code § 29-29-02 (1961).

8. Rule 41(b) of the Fed. R. Crim. P.

9. "Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property.

"1. Stolen or embezzled in violation of the laws of the United States; or

2. Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

3. Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., § 957." Rule 41(b) of the Fed. R. Crim. P.

"Whoever, in aid of any foreign government, knowingly and willfully possesses or controls any property or papers used or designed intended for use in violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than $1,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 957.

reasonable a search must be for instruments of a crime, weapons by which escape may be effected, or contraband.[10]

An application for a search warrant must be made to a magistrate by a sworn complaint setting forth the grounds for the issuance of the search warrant and describing with particularity the person or the place to be searched and the personal property to be seized.[11]

A search warrant will not be issued unless the magistrate is satisfied, after the examination under oath of the complainant and of such witnesses as he may have produced, that there is probable cause to believe that grounds exist for the issuance of the warrant.[12] This is only another way of saying that there must be probable cause to believe that a crime has been or is about to be committed and that a search will disclose fruits or instrumentalities of crime.[13] Probable cause has been defined as facts sufficient to justify

---

10. In Harris v. U.S., 331 U.S. 145, 154, 67 Sup. Ct. 1098, 1103 (1947) the court said: "This court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be affected, and property the possession of which is a crime." See also Williams v. U.S., 263 F.2d 487 (D.C. Cir. 1959), and U.S. v. Alberti, 120 F. Supp., 171 (D.C.N.Y. 1954).

11. "A search warrant can be issued only upon probable cause supported by affidavit naming or describing the person, and particularly describing the property and place to be searched." N. D. Cent. Code § 29-29-03 (1961). "A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing and law therof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned." Rule 41(c) of the Fed. R. Crim. P.

12. "The Magistrate, before issuing a search warrant, must examine on oath the complainant and any witnesses he may produce, and must take their affidavits in writing and cause them to be subscribed by the parties making them. The depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist." N. D. Cent. Code § 29-29-04 (1961).

"If a magistrate is satisfied of the existence of grounds of the application for a search warrant, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him, with the name of his office, to a peace officer in his county, commanding him forthwith to search the person or place named for the property specified, and to bring it before the magistrate to be dealt with according to law." N. D. Cent. Code § 29-29-05 (1961).

13. Note in 32 Ind. L. Rev. 332 at 345.

a prudent and cautious man in believing that an offense has been committed, which is less than certainty of proof, but more than a suspicion or a possibility;[14] or which are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed or is being committed.[15] An affidavit in support of an application for the issuance of a search warrant, which merely sets forth the affiant's belief that there is reason to search, but does not disclose the facts and circumstances does not satisfy the requirement of probable cause.[16] However, such an affidavit has been held to be sufficient although the facts stated therein are based upon hearsay,[17] where there is a substantial basis for crediting the hearsay evidence.[18] The magistrate will issue the warrant when he is convinced that there is probable cause to believe that grounds exist for the issuance of it.[19] In North Dakota a person who maliciously and without probable cause procures the issuance of a search warrant shall be guilty of a misdemeanor.[20]

If there has been a positive representation under oath that the property is on the person or in the place to be searched the warrant will direct that it be served at any time of the day or night, but in absence of such a representation, the search warrant can be served only during the daytime in North Dakota.[21] An officer directed to serve a search warrant may break open an outer or inner door or window of a house to serve such a warrant, where he is refused admittance after he has given notice of his authority and his purpose.[22] A peace officer who wilfully exceeds

14. In Dean v. State, 107 A.2d 88 (Md. 1954), where the question arose as to probable cause for the issuance of a search warrant the court said on page 92 of its opinion: "Probable cause is to be determined by the judge who issues the warrant, and the facts relied upon to show its existence are sufficient if they are such as to justify a prudent and cautious man in believing that the offense has been committed. Fleming v. State, 201 Md. 145, 149, 92 A.2d 747, 749; Smith v. State, 191 Md. 329, 62 A.2d 287, 5 A.L.R.2d 386; Lucich v. State, 194 Md. 511, 71 A.2d 432. As was said in those cases, probable cause is less than certainty of a proof but more than suspicion or possibility."

15. Draper v. U.S. 358 U.S. 307, 312, 79 Sup. Ct. 329, 333 (1959); U.S. v. Nicholson, 303 F.2d 330 (C.A. Tenn. 1962); Evans v. U.S. 242 F.2d 534, 536 (C.A. Tenn. 1957), **Cert. Denied** 352 U.S. 976, 77 Sup. Ct. 1059 (1957).

16. Nathanson v. U.S., 290 U.S. 41, 47, 54 Sup. Ct. 11, 13 (1933).

17. Jones v. U.S., 362 U.S. 257, 271, 80 Sup. Ct. 725, 736 (1960); and U.S. v. Eisner, 297 F.2d, 595, 596 (1962).

18. Chin Kay v. U.S., 311 F.2d 317, 320 (1962); U.S. v. Eisner, 297 F.2d 595, 596 (1962).

19. N. D. Cent. Code § 29-29-05 (1961).

20. N. D. Cent. Code § 29-29-18 (1961).

21. N. D. Cent. Code § 29-29-10 (1961).

22. N. D. Cent. Code § 29-29-08 (1961).

his authority in the execution of a search warrant or exercizes it with unnecessary severity is guilty of a misdemeanor under the North Dakota Code.[23] After the officer has executed the warrant by having made the search directed to be made he is required by the North Dakota Code to return the warrant to the magistrate who issued it, together with a written inventory of the property taken[24] and the magistrate, if requested, must deliver a copy of the inventory to the person from whose possession the property was taken and he must also deliver a copy of such inventory to the person who made application for the warrant.[25] A search warrant becomes void under the North Dakota Code if it is not executed within ten days after it has been issued.[26]

A search warrant is not required for the search of open fields,[27] or of a public place.[28]

SEARCH INCIDENT TO A LAWFUL ARREST

A search which is an incident to a lawful arrest is reasonable and is therefore not prohibited by the Federal and North Dakota Constitutions.[29] The purposes making such a search reasonable are: the protection of the officer,[30] the prevention of escape,[31] and the preservation of the fruits or instrumentality of the crime.[32]

An arrest is defined by the North Dakota Code as ". . . the taking of a person into custody in the manner authorized by law to answer for the commission of an offense."[33] According to the North Dakota Code "An arrest

23. N. D. Cent. Code § 29-29-19 (1961).
24. N. D. Cent. Code § 29-29-12 (1961).
25. N. D. Cent. Code § 29-29-13 (1961).
26. N. D. Cent. Code § 29-29-11 (1961).
27. Hester v. U.S., 265 U.S. 57, 44 Sup. Ct. 445 (1924); Giacona v. U.S., 257 F.2d 450 (5th Cir. 1958); Edwards v. U.S., 206 F.2d 855 (10th Cir. 1953); Martin v. U.S. 155 F.2d 503 (5th Cir. 1946).
28. Ellison v. U.S., 206 F.2d 476 (D.C. Cir., 1953) where officers who were waiting on defendants porch after having rung his doorbell, saw stolen goods.
29. Agnello v. U.S. 269 U.S. 20, 30, 46 Sup. Ct. 4, 5 (1925); Harris v. U.S. 331 U.S. 145, 67 Sup. Ct. 1098 (1947); People v. Edge, 94 N.E.2d 359 (Ill. 1950); and People v. Chiagles, 142 N.E. 583 (N.Y. 1923).
30. "An officer has authority, incidental to a lawful arrest, to search the prisoner after his arrest. The justification is the officer's safety. . . ." ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 26 (1947), Commonwealth v. Lewis, 217 S.W.2d 625 (1949); Brinegar v. State. 262 P.2d 464 (1953); Edwards v. State 319 P.2d 1021 (1957); and Travers v. U.S., 144 A.2d 889 (D.C. 1958).
31. Agnello v. U.S., 269 U.S. 20, 30, 46 Sup. Ct. 4, 5 (1925).
32. Agnello v. U.S., 269 20, 30, 46 Sup. Ct. 4, 5 (1925).
33. N. D. Cent. Code § 29-06-01 (1961).

is made by an actual restraint of the person of the defendant, or by his submission to the custody of the person making the arrest."[34]

An arrest is valid when it is made either in the execution of a valid warrant for arrest or without a warrant by a peace officer or a citizen. The first requirement for the issuance of a valid arrest warrant is the filing with a magistrate of a complaint by a person who has reason to believe that a public offense has been committed by another person.[35] Such a complaint is required by the North Dakota Code to identify the accused, state the county in which the offense was committed, designate the offense, state the acts or omissions constituting the offense, describe the person or property against whom the offense was committed and, if the offense is against property, give a general description of the property.[36] If the magistrate, after the examination of the complainant and other witnesses, if any, has reasonable ground to believe that an offense has been committed and that the person against whom the complaint is made committed it, he will issue a warrant for the arrest of such person.[37] The warrant, which is directed to all peace officers in the State of North Dakota[38] must specify the name of the accused, state the offense charged, and be signed by the magistrate who issued the warrant.[39] The warrant may be executed in any county in the State of North Dakota by any peace officer in the state of North Dakota.[40]

A peace officer, who may be either a sheriff, a deputy sheriff, a coroner, a constable, a marshal or a policeman of a township, city or village,[41] can make an arrest in North Dakota: when a public offense is attempted or committed in the officer's presence; when a felony has been committed by the arrestee but not in the officer's presence; when a felony in fact has been committed, and the officer has reasonable cause to believe that his arrestee committed it; when a charge has been made upon reasonable cause, of

34. N. D. Cent. Code § 29-06-09 (1961).
35. N. D. Cent. Code § 29-05-02 (1961).
36. N. D. Cent. Code § 29-05-01 (1961).
37. N. D. Cent. Code § 29-05-06 (1961).
38. N. D. Cent. Code § 29-05-09 (1961).
39. N. D. Cent. Code § 29-05-08 (1961).
40. N. D. Cent. Code § 29-05-09 (1961).
41. N. D. Cent. Code § 29-05-10 (1961).

the commission of a felony by the arrestee;[42] when there has been a traffic accident in violation of the Motor Vehicle Act[43] by a nonresident driver, and the police officer, who is at the scene of the accident has probable cause to believe that such driver has committed any offense under the provisions of such Act and that he will disregard a written promise to appear in court;[44] and when a public offense is committed in the presence of a magistrate and the peace officer is ordered by the magistrate to arrest the offender.[45]

A private person can make a valid arrest in North Dakota: when a public offense is attempted or committed in his presence; when his arrestee has committed a felony but not in his presence; where a felony has been in fact committed and he has reasonable ground to believe that his arrestee committed it;[46] and when an offense is committed in the presence of a magistrate and such private person is ordered by the magistrate to arrest the offender.[47] The only difference between a valid arrest without a warrant by a peace officer and such an arrest by a private person in North Dakota is that a peace officer may validly arrest upon probable cause to believe that a felony has been committed and that his arrestee has committed it although in fact no felony has been committed and also in the case of certain violations of the Motor Vehicle Act; whereas a private person can not arrest upon probable cause to believe that a felony has been committed unless in fact it has been committed and a private person has no authority to arrest in the case of violations of the Motor Vehicle Act by a nonresident violator unless it constitutes a public offense. It is virtually impossible to lay down a general definition of probable cause, which will encompass in all respects every arrest without a warrant, for the obvious reason that facts and circumstances vary in particular cases. A satisfactory definition for general use is found in *Dean v. State*[48] where it was held that probable cause is a state of facts sufficient to justify a prudent and cautious man in believing

42. N. D. Cent. Code § 29-06-15 (1961).
43. Title 39 of the N. D. Cent. Code (1961).
44. N. D. Cent. Code § 29-06-15.1 (1961).
45. N. D. Cent. Code § 29-06-19 (1961).
46. N. D. Cent. Code § 29-06-20 (1961).
47. N. D. Cent. Code § 26-06-19 (1961).
48. 107 A.2d 88 (Md. 1954).

that the offense has been committed and that such state of facts is not required to be such as to establish guilt, but it must be such as to establish more than a mere suspicion of guilt. United States Supreme Court decisions in defining probable cause appear to range from a liberal to a strict definition of it,[49] with one case holding that probable cause can be properly based upon hearsay.[50] An arrest, either with or without a warrant, which does not satisfy the requirement of probable cause is illegal and any search incident thereto is also unreasonable. Nothing discovered as the result of such a search can make it a reasonable search.[51] Probable cause is not required for a search as an incident to a lawful arrest where probable cause for such an arrest has been established.[52] An advantage in the making of a search as an incident to an arrest under a warrant is that the matter of probable cause for the arrest has already been favorably resolved, and the officer is relieved of the necessity for knowing the facts and circumstances constituting probable cause for the arrest. However, a warrant for an arrest can actually be fatal to the incidental search where the warrant is defective.[53]

An arrest is not valid where the arrest is a mere subterfuge for the making of a search, and any search made after such an arrest is unreasonable because it is not an incident to a lawful arrest.[54]

Although a search is usually limited to those things connected with the offense for which the arrest is made, if a valid search incident to a lawful arrest discloses an object which the arrestee can not lawfully possess, such an object can lawfully be seized for the reason that the possession by the arrestee constitutes a crime which is being committed

---

49. Jones v. U.S., 362 U.S. 258, 80 Sup. Ct. 725 (1960); Johnson v. U.S., 333 U.S. 10, 68 Sup. Ct. 367 (1948); and Mallory v. U.S., 354 U.S. 449, 77 Sup. Ct. 1356 (1957). An excellent note on the liberal and strict definition of probable cause by the United States Supreme Court is found in a note in 10 Loyola L. Rev. 116 (1959-60).

50. Jones v. U.S., 362 U.S. 257, 80 Sup. Ct. 725 (1960).

51. Collins v. State, 65 So. 2d 61, 66 (Fla. 1953).

52. Kaplan, **Search and Seizure: A No-man's Land in Criminal Law**, 49 Cal. L. Rev. 474, at 493.

53. Kaplan. **Search and Seizure: A No-man's Land in Criminal Law**, 49 Cal. L. Rev. 474, at 498.

54. State v. Michaels, 374 P.2d 989 (Wash. 1962) which involved an arrest for a traffic violation made solely for the purpose of searching the vehicle to determine whether it contained contraband property; Collins v. State 65 So. 2d 61 (Fla. 1953). See also U.S. v. Lefkowitz, 285 U.S. 452, 52 Sup. Ct. 420 (1932).

in the arrestor's presence and thereby furnishes the authority for such seizure.[55]

There is a time differential in the case of a search incidental to a lawful arrest. The search must be made immediately after the arrest and not before such arrest under the majority rule,[56] except that contraband which is visible to an officer without a trespass, can be lawfully seized before the arrest because the possession of contraband is a crime which is being committed in the presence of the officer.[57] The return to the place of arrest to search after the arrest is complete constitutes an unreasonable search[58] for the reason that a search warrant could have been obtained in the meantime.[59]

A SEARCH AS AN INCIDENT TO ARREST FOR A TRAFFIC VIOLATION

The search by an officer of a vehicle or a person as an incident to a lawful arrest for a traffic violation is reasonable and therefore valid when it is necessary: for the protection of the officer;[60] to prevent the escape of the arrestee;[61] or to discover liquor or drugs when the arrest has been made for driving while under the influence of liquor or drugs.[62]

Upon a lawful arrest for a traffic violation the officer has the right, as an incident to such an arrest, to search

---

55. Harris v. U.S., 331 U.S. 145, 67 Sup. Ct. 1098 (1947) in which a search as an incident to a lawful arrest for violation of a mail fraud statute disclosed draft cards illegally possessed by the arrestee, which were property received in evidence, over objection in a subsequent prosecution for the violation of the Selective Service Act.

56. Gatewood v. U.S., 209 F.2d 789 (D.C.C.A. 1953); Commonwealth v. Lewis 217 S.W.2d 625 (Ky. 1949).

Courts in the states of California and Washington, which represent the minority rule, have expressly held that a search may precede an arrest where the officer has a right to make an arrest, but in order for such a search to be an incident to a lawful arrest the officer must have been physically able to have made an arrest at the time of such search. People v. Simon, 290 P.2d 531 (Cal. 1955); and State v. Brooks, 357 P.2d 735 (Wash. 1961).

57. Harris v. U.S., 331 U.S. 145, 67 Sup. Ct. 1098 (1947).

58. People v. Kalpak, 140 N.E.2d 726 (Ill. 1957); Rent v. U.S., 209 F.2d 893 (5th Cir. 1954).

59. Shurman v. U.S. 219 F.2d 282 (5th Cir. 1955).

60. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 26 (1947); Commonwealth v. Lewis, 217 S.W.2d 625 (1949); Brinegar v. State, 262 P.2d 464 (1953); Edwards v. State, 319 P.2d 1021 (1957).

61. Brinegar v. State, 262 P.2d 464 (1953); Edwards v. State, 319 P.2d 1021 (1957).

62. Thompson v. State, 121 So. 275 (Miss. 1929); Bennett v. State, 324 P.2d 873 (Okla. 1958); Fuqua v. State, 130 S.W.2d 125 (Tenn. 1939); Smyrle v. State, 298 S.W. 598 (Tex. 1927); People v. Johnson, 294 P.2d 189 (Cal. 1956).

the person of the one arrested and the automobile, including an unlocked glove compartment, for weapons, if the officer has reasonable cause to fear for his own safety or to believe that the one arrested may try to escape.[63] The search of the locked trunk or the locked glove compartment of an automobile can not usually be made as an incident to a valid arrest for a traffic violation unless the arrest has been for reckless driving, and the officer has reason to be suspicious of the occupants of the automobile, or the arrest has been for driving while under the influence of liquor or of drugs,[64] or the search incident to the arrest for an ordinary traffic violation has disclosed evidence of the commission of a felony.[65] A passenger in the vehicle can not usually be searched as an incident to the arrest of the driver of the vehicle for a traffic violation.[66]

The seizure of items without a search warrant, in the case of a traffic violation, is reasonable: where the property is contraband or it is the fruit or an instrument of another crime and it is in plain view of the officer;[67] where such property is disclosed as the result of a search of the vehicle which is authorized because the vehicle itself is the instrumentality with which an offense has been committed;[68] or where such property has come to the attention of the officer by virtue of the making by him of an inventory required to be made of the contents of a vehicle impounded pursuant to law.[69]

Some cases decided in 1959 and 1960 have undertaken

---

63. See **Supra** note 62.
64. See **Supra** note 62.
65. Brinegar v. State, 262 P.2d 464 (Okla. 1953).
66. U.S. v. Di Re, 332 U.S. 581, 68 Sup. Ct. 222 (1948).
67. People v. Carnes, 343 P.2d 626 (Cal. 1959); and Childers v. Commonwealth, 286 S.W.2d 369 (Ky. 1955), where the officer shined his flashlight into the car; Campbell v. U.S., 289 F.2d 775 (D.C.C.A. 1961) where the driver's having gotten out of his automobile to show the officer his registration card caused the dome light to illuminate the interior of the car; State v. Padgett, 289 S.W. 954 (Mo. 1926) where a bottle of whiskey fell out of the driver's pocket as he was being pulled out of the car by the officer; State v. Brooks, 357 P.2d 735 (Wash. 1961) where the officer opens the door of the car to question the driver of an illegally parked car; Koscielski v. State, 158 N.E. 902 (Ind. 1927); State v. Christensen, 51 P.2d 835 (Ore. 1935) where the officer looked into a parked car from the highway.
68. State v. Randolph, 353 P.2d 238 (Ore. 1960) where the automobile was being operated by the driver while he was intoxicated.
69. State v. Giles 199 S.E.2d 394 (N.C. 1961) where the automobile had been left on the highway after the driver had been arrested and taken to the police station. The Model Traffic Ordinance Revised as of 1956 provides in Section 19-16 for the impounding of vehicles "(1) When any vehicle is left unattended upon any bridge, viaduct, or causeway, or in any tube or tunnel where such vehicle constitutes an obstruction to traf-

arrest for a traffic violation, by requiring the usual grounds for search — the protection of the officer, the prevention of escape of the arrestee and the preservation of the fruits of instrumentality of the crime — to be determined upon the facts and circumstances of the particular case.[70] All of those cases involved the service of a summons upon the violator, which is only a notice to appear before a magistrate and therefore does not constitute an arrest.[71] For this reason such cases can be distinguished from the earlier cases authorizing such a search.[72] Other cases denying the right to search as an incident to a lawful arrest for a traffic violation can be distinguished either on the ground that they involve an unlawful arrest[73] or that the search of the vehicle was not authorized.[74]

A SEARCH OF A MOTOR VEHICLE WITHOUT A WARRANT

A lawful search can be made by an officer of an occupied motor vehicle, without a warrant and without its being an incident to a lawful arrest if the officer has reasonable cause to believe that the motor vehicle contains contraband.[75] Such a search is reasonable because there is not usually sufficient time to obtain a search warrant before the vehicle is removed.[76] Although such a search is permitted to prevent the removal or concealment of the contraband before a search warrant can be obtained, the vehicle need not be actually in motion at that time.[77]

---

fic. (2) When a vehicle upon a highway is so disabled as to constitute an obstruction to traffic and the person or persons in charge of the vehicle are by reason of physical injury incapacitated to such an extent as to be unable to provide for its custody or removal. (3) When any vehicle is left unattended upon a street and is so parked illegally as to constitute a definite hazzard or obstruction to the normal movement of traffic."

70. People v. Watkins, 166 N.E.2d 433 (Ill. 1960); People v. Mayo, 166 N.E.2d 440 (Ill. 1960); People v. Gonzales,, 97 N.W.2d 16 (Mich. 1959); People v. Zeigler, 100 N.W.2d 456 (Mich. 1960).

71. Berry v. Bass, 102 So. 76 (La. 1924).

72. People v. Clark, 137 N.E.2d 820 (Ill. 1956) which involved a search after an arrest for the violation of a municipal parking ordinance; People v. Berry, 161 N.E.2d 315 (Ill. 1959) where the search was after an arrest for the violation of the law providing that vehicles be registered with the Secretary of State. An excellent discussion of this matter is found in Agata, **A Reply To Professor Simeone,** 7 St. Louis U. Law Rev. 1 (1962).

73. Robertson v. State, 198 S.W.2d 633 (Tenn. 1947).

74. Elliot v. State, 116 S.W.2d 1009 (Tenn. 1938).

75. Carroll v. U.S., 267 U.S. 132, 45 Sup. Ct. 280 (1925).

76. **Supra** note 75.

77. Scher v. U.S. 305 U.S. 251, 59 Sup. Ct. 174 (1938).

STOPPING MOTOR VEHICLES FOR INSPECTION PURPOSES

It is not unreasonable to stop a motor vehicle without a warrant for the purpose of a reasonable investigation of the vehicle, the driver,[78] or the driver's license.[79] Such a stopping of a motorist does not constitute the taking of him into custody and it is therefore not an arrest.[80] Accordingly, such an investigation or search is not justified as an incident to a lawful arrest, but is instead justified upon the ground that the operation of a motor vehicle is affected with a public interest.[81] Any contraband or evidence of the commission of a crime discovered in the process of such an investigation is the product of a reasonable search and can provide probable cause for an arrest by the police officer without a warrant and, after such an arrest, justify a further search which is reasonable as an incident to a lawful arrest.[82]

THE RIGHT OF AN OFFICER TO SEARCH A PERSON WHO HAS BEEN STOPPED SOLELY FOR QUESTIONING

The general rule is that a police officer may lawfully stop and detain a person for questioning where the public interest involved makes it reasonable to do so.[83] The early common law forbade a search of the person prior to a lawful arrest for the probable reason that the dangerous weapons of that time were either a sword, staff or a bow and arrow and were therefore so clearly visible that a search of the person was unnecessary for the protection of the officer.[84] With the advent of easily concealed firearms which can be fired from under clothing without warning, the safety of an officer making a lawful investigation could very well depend upon his right to make a preliminary search for a dangerous weapon.[85] The Uniform Arrest Act, Section 3, drafted by the Interstate Commission on Crime,

78. Moore v. State, 306 P.2d 358 (Okla. 1957).
79. State v. Hatfield, 164 S.E. 518 (W. Va. 1932); Commonwealth v. Mitchell, 355 S.W.2d 686 (Ky. 1962).
80. PERKINS, THE TENNESSEE LAW OF ARREST 523-24.
81. Miami v. Aronwitz, 114 So. 2d 784 (Fla. 1959); Commonwealth v. Abell, 122 S.W.2d 757 (Ky. 1939).
82. Harris v. U.S., 331 U.S. 145, 154, 67 Sup. Ct. 1098, 1103 (1947); and Brinegar v. State 262 P.2d 464, 479 (Okla. 1953).
83. Gisske v. Sanders, 98 Pac. 43 (1908).
84. Warner, **The Uniform Arrest Act**, 28 Va. L. Rev. 315, 324 (1942).
85. PERKINS, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 721 (1952).

permits a peace officer to ". . . search for a dangerous weapon, any person whom he has stopped or detained to question . . . whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. . . ."[85].[1] Such a search is clearly reasonable when all of the circumstances involved in the particular investigation indicate that such a precautionary measure is necessary for the safety of the officer.[85].[2]

OTHER ILLUSTRATIONS OF REASONABLE SEARCHES WITHOUT A WARRANT

When a person in an unconscious condition is discovered by the police, a search of such person is reasonable for the reason that he might be in need of special medical care, because of diabetes or an allergy, which would be disclosed by a card in his possession.[85].[3]

It was held in *Frank v. State of Maryland*[86] that an inspector of the Baltimore City Health Department has the right, without a search warrant to inspect dwellings for the purpose of determining the source of a rat infestation. The Health Code of the City of Baltimore required that " . . . every dwelling and every part thereof shall be kept clean and free from and accumulation of dirt, filth, rubbish, garbage or similar matter, and shall be kept free from vermin or rodent infestation." The search without a search warrant was held to be reasonable upon the ground that the maintenance of community health would be greatly hobbled by the blanket requirement of the safeguards necessary for a search for evidence of criminal acts.[87] About a year later an equally divided United States Supreme Court in *Ohio v. Price*[88] affirmed the decision of the Ohio Supreme Court, which upheld an ordinance authorizing the same at any reasonable hour, with a penalty provided for refusal to allow such an inspection.

85.1 Warner, **The Uniform Arrest Act,** 28 Va. L. Rev. 315, 344.
85.2 **Supra** note 60.
85.3 Commonwealth v. Griffith, No. 294, May 1962 Sess. Erie County Pa., Q. Sess. June 21, 1962, at 5-6, cited in Mr. Arlen Specter's excellent article entitled **Mapp v. Ohio: Pandora's Problems For the Prosecutor,** 111 U. of Pa. L. Rev. 4 at 16. The writer of this article does not have access to this Griffith case.
86. 359 U.S. 360, 79 Sup. Ct. 804 (1959).
87. 359 U.S. 360, 372, 79 Sup. Ct. 804, 811 (1959).
88. 364 U.S. 263, 80 Sup. Ct. 1463 (1960).

In *State v. Cohn*[89] where the police and firemen inspected a building after a fire for the purpose of determining the cause of the fire and to prevent the fire from breaking out again, it was held that such an inspection constituted a reasonable search, because such inspection was for the benefit of the public generally and any evidence discovered as a result thereof had been lawfully obtained.

Persons and vehicles crossing inter-national boundaries may be legally searched without a warrant. Such a search is reasonable because it is required for reasons of national security and welfare.[89 1]

The search by a police officer of a truck parked at a dark intersection at night without lights, with its left wheels over the paved road, and its windows open, has been held to be reasonable since such a search was made by the officer in the performance of his official duty.[90]

EXTENT OF THE SEARCH OF THE PERSON

A search of the person is reasonable when it is made pursuant to a search warrant or is an incident to a lawful arrest. It is when invasions of the body of the person are undertaken that the propriety of the search is most frequently questioned. The California Supreme Court has held that the taking of a blood sample by medically approved procedures from a motorist without his consent, for the purpose of making an alcohol test is a reasonable search when there is cause to believe that the motorist has violated the statute which provides that the injury of another when driving while intoxicated is a felony.[91] Such a taking of a blood sample is in effect a search incidental to a lawful arrest because California is one of the few states which permits a search prior to an arrest when the officer has the right and the ability to have made an arrest at the time of the search. A blood sample taken by approved medical procedure from an unconscious driver for an alcohol test, after a traffic violation, but before a lawful arrest for such

89. 347 S.W.2d 691 (Mo. 1961).
89.1 47 Am. Jur., Search and Seizure § 18.
90. Gaskins v. State, 89 So. 2d 867 (Fla. 1956). See also Smith v. State, 290 S.W. 4 (Tenn. 1927).
91. People v. Duroncelay, 312 P.2d 690 (Cal. 1957).

violation has been held in the States of Delaware,[92] Iowa,[93] Michigan[94] and Wisconsin,[95] and by the United States Supreme Court[96] not to be a reasonable search.

A lower federal court[97] has held that it is a reasonable search for a doctor to use a rectal probe for the removal of a fingerstall containing narcotics, when such removal was preceded by the discovery of a greasy substance around the anus of the defendant, after an examination of his person, following a lawful arrest for the illegal possession of narcotics. Another lower federal court[98] has held that it is a reasonable search for a physician to use an emetic to cause a suspected smuggler to disgorge narcotics after a fluoroscopic examination has disclosed a foreign object in the abdomen of the suspect, who had presented himself at a customs inspection station for entry into the United States.

The *Rochim* case[99] held that the forced pumping of the stomach by approved medical procedures, of a person suspected of having swallowed narcotics, after the police had first unlawfully broken into his bedroom and had attempted by force to manually remove the container from the mouth of the suspect, is a violation of due process. The later *Irvine* case[100] has limited the effect of the *Rochim* case to situations involving physical violence and brutality.

AREA OF SEARCH

The requirement that the search warrant describe with particularity the place to be searched,[101] constitutes a limitation upon the area to be searched under a search warrant. When the search is an incident to a lawful arrest without a warrant it was held by the United States Supreme Court in *Marron v. U.S.*[102] that the search was not limited to the room where the arrest took place, but instead could include

92. Delaware v. Wolf, 164 A.2d 865 (Del. 1960).
93. State v. Weltha, 292 N.W. 148 (Iowa 1940); State v. Tonn, 191 N.W. 530 (Iowa 1923).
94. Lebel v. Swincicki, 93 N.W.2d 281 (Mich. 1958).
95. State v. Kroening, 79 N.W.2d 810 (Wis. 1956).
96. Breithaupt v. Abram, 352 U.S. 432, 77 Sup. Ct. 408 (1957).
97. Application of Woods, 154 F. Supp. 932 (D.C. Cal. 1957).
98. U.S. v. Michel, 158 F. Supp. 34 (D.C. Tex. 1957).
99. Rochin v. People of California, 342 U.S. 165, 72 Sup. Ct. 205 (1952).
100. Irvine v. People of California, 347 U.S. 128, 74 Sup. Ct. 381 (1954).
101. N. D. Cent. Code § 29-29-03 (1961).
102. 275 U.S. 192, 48 Sup. Ct. 74 (1927).

all parts of the premises under the control of the arrestee. *Go-Bart Importing Co. v. U. S.*,[103] which was an arrest under a warrant, established a limitation upon the *Marron* case by holding that the search of the premises where the arrest was made was unreasonable. A year later it was held in *U.S. v. Lefkowitz*,[104] which was also an arrest under a warrant, that the search of the room where the arrest was made was unreasonable. The only possibility of reconciling the *Go-Bart Importing Co.* and the *Lefkowitz* cases with the *Marron* case is upon the ground that there is greater latitude of search of the place of arrest when the arrest is made for an offense committed in the presence of the officer, as in the *Marron* case, than where the arrest is made upon a warrant, as was true in the *Go-Bart Importing Co.* and *Lefkowitz* cases. *U.S. v. Harris*,[105] which was decided about sixteen years after the *Go-Bart Importing Co.* and *Lefkowitz* cases and was an arrest upon a warrant, enlarged the search authorized by the *Go-Bart Importing Co.* and *Lefkowitz* cases and represents a return to the broader search of the *Marron* case by holding that, where the arrestee is in exclusive possession of a four room apartment, a search which extends beyond the room in which he was arrested is reasonable. In *United States v. Rabinowitz*[106] decided in 1950, it was held that the search of a one room office where the arrest was made under a warrant was reasonable.

Greater liberality of search incident to a lawful arrest marks the trend in the lower federal courts. *Kernick v. U. S.*[107] held that a search was reasonable where the defendant was validly arrested without a warrant in a railroad station and a search of his person in a police room just off of the lobby and next to the baggage room produced a baggage check and a key which resulted in the obtaining and the opening of a suit case containing heroin. *Clifton v. U.S.*[108] permitted the search of the arrestee's residence although the arrest had been made, in the yard of the residence. According to *U.S. v. Jackson*[109] the search of the apartment

108. 224 F.2d 329 (4th Cir. 1955).
109. 149 F. Supp. 937 (D.C. D.C. 1957).
103. 282 U.S. 344, 51 Sup. Ct. 153 (1931).
104. 285 U.S. 452, 52 Sup. Ct. 420 (1932).
105. 331 U.S. 145, 67 Sup. Ct. 1098 (1947).
106. 339 U.S. 56, 70 Sup. Ct. 430 (1950).
107. 242 F.2d 818 (8th Cir. 1957).

of the arrestee a half a block from the place where the arrest was made was reasonable, because the key used to open the apartment had been taken from the person of the arrestee at the time of his arrest. It has been said that if this trend is carried to its logical conclusion the constitutional prohibition against unreasonable searches and seizures is very likely to become a mere historical curiosity.[110]

CONSENT

Consent makes a search reasonable because it is in effect a waiver of the constitutional protection against an unreasonable search,[111] but submission to authority should not be mistaken for consent to search,[112] and the State therefore has the burden of establishing that there has been a valid consent to the search.[113] Obviously, an effective consent to search can be given only by the one whose right of privacy is involved or by someone who has the authority to give such consent upon his behalf. In this connection it has been held that a search made by an officer in reliance upon apparent authority to give consent to a search makes such a search reasonable.[114]

Since spouses are not agents of the other, in absence of a special agreement to that effect, neither can give effective consent to a search of the others property,[115] but if they occupy the same building as joint tenants, either has the right to consent to the search of the building, and the evidence discovered as the result of such a search can be validly used against either of them.[116] However, it has been held that a husband by virtue of his being head of the household can give a valid consent to the search of the premises he occupies with his wife,[117] and that a wife, who, in the absence of her husband, controls the premises occupied by

110. Way, **Increasing Scope of Search Incidental To Arrest,** 1959 Wash. U. L. Q., 261, 279.
111. U.S. v. Shules, 65 F.2d 780 (C.A. 2d Cir. 1933).
112. Application of Fried, 68 F. Supp. 961 (D.C.N.Y. 1946).
113. Channel v. U.S., 285 F.2d 217 (C.A. 9th Cir. 1960); Judd v. U.S., 190 F.2d 649 (C.A. D.C. 1951); People v. Georg, 291 P.2d 469 (Cal. 1955).
114. People v. Misquez, 313 P.2d 206 (Cal. 1957); People v. Caritativo, 292 P.2d 513 (Cal. 1956).
115. Simmons v. State, 229 P.2d 615 (Okla. 1951); Kelley v. State, 197 S.W.2d 545 (Tenn. 1946).
116. People v. Shambley 122 N.E.2d 173 (Ill. 1954).
117. Jones v. State, 177 P.2d 148 (Okla. 1946).

her and her husband can give a valid consent to the search of such premises.[118]

A landlord can not validly consent to a search of the tenant's premises[119] and the reservation of the right by the landlord to inspect the leased premises does not enable the landlord to do so,[120] but the hotel manager can give a valid consent to the search of a hotel room after the guest has relinquished the room.[121] Persons who have been given the use and occupancy of a home by the owner thereof can validly consent to the search of a room in such a home, which is being occupied by a guest.[122]

Consent by a partner to a search of the partnership premises is binding upon all of the partners, and evidence discovered as a result thereof can be used against any of the partners.[123] The official superior of an employee can not validly consent to the search of the desk of the employee when the desk was assigned to her exclusive use in the office where the employee worked,[124] but it has been held that the superintendent of a six-family house can give a valid consent to the search of the cellar of the building and that the consent is binding upon the owner of such building.[125]

STANDING

Only the person whose right to privacy has been violated can object to an unreasonable search.[126] One who undertakes to complain of an unreasonable search must either own, lease, control, lawfully occupy, rightfully possess, or have an interest in the premises searched, or in the property taken.[127] It has been held by State Courts that neither trespassers,[128] nor guests,[129] have standing to object to a

118. People v. Carter, 312 P.2d 665 (Cal. 1957). **But** Cf. Dalton v. State 105 N.E.2d 509 (Ind. 1952).
119. Chapman v. U.S., 365 U.S. 610, 81 Sup. Ct. 776 (1961).
120. Klee v. U.S., 53 F.2d 58 (C.A. 9th Cir. 1931).
121. Abel v. U.S., 362 U.S. 217, 80 Sup. Ct. 683 (1960).
122. State v. Broadhurst, 190 P.2d 407 (Ore. 1948), **Cert. denied** 337 U.S. 906 (1949).
123. U.S. v. Sferas, 210 F.2d 69 (C.A. 7th Cir. 1954).
124. U.S. v. Blok, 188 F.2d (C.A. D.C. 1950).
125. Reszutek v. U.S., 147 F.2d 143 (C.A. 2d Cir. 1945).
126. Edwards v. State, 228 P.2d 672 (Okla. 1951); Powell v. Commonwealth, 282 S.W.2d 340 (Ky. 1955).
127. Kapler v. State, 71 A.2d 860 (Md. 1950); Powell v. Commonwealth, 282 S.W.2d 340 (Ky. 1955); State v. Smith, 118 So. 2d 792 (Fla. 1960).
128. Carter v. Commonwealth, 28 S.W.2d 976 (Ky. 1930).
129. Paige v. State, (Tex. 1955); Anderson v. Commonwealth, 229 S.W.2d 756 (Ky. 1950).

search of the premises occupied by them. In 1960, the United States Supreme Court held, in *Jones v. U.S.*,[130] that "anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."[131] A person aggrieved by an unlawful search and seizure was defined by the court as being ". . . a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."[132] The court also said "Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."[133] A lower federal court has undertaken to limit the application of the *Jones* decision[134] to those cases where the accused is charged with legal possession.[135]

It has been held by the California courts that any evidence obtained in violation of constitutional guarantees is inadmissible whether or not it was obtained in violation of the constitutional rights of the particular defendant.[136]

WIRE TAPPING

The United States Supreme Court held in the *Olmstead* case[137] that wire tapping is not a search prohibited by the Fourth Amendment of the Federal Constitution. It was this *Olmstead* case which was responsible for the enactment by Congress of Section 605 of the Federal Communications Act[138] which provides in part that ". . . no person, not being authorized by the sender shall intercept any communication (by wire) and divulge . . . such intercepted communication to any person." The *Schwartz* case[139] decided by the United States Supreme Court in 1952 held that wire tap evidence obtained

130. 362 U.S. 257, 80 Sup. Ct. 725.
131. 362 U.S. 257, 267, 80 Sup. Ct., 725, 734 (1960).
132. 362 U.S. 257, 261, 80 Sup. Ct. 725, 731 (1960).
133. 362 U.S. 257, 266, 80 Sup. Ct. 725, 733 (1960).
134. 362 U.S. 257, 80 Sup. Ct. 725 (1960).
135. Ramirez v. U.S., 294 F.2d 277 (C.A. 1961).
136. People v. Martin, 290 P.2d 855, 857 (Cal. 1955).
137. Olmstead v. U.S. 277 U.S. 438, 48 Sup. Ct. 564 (1928). See also People v. Dinan, 183 N.E.2d 689 (N.Y. 1962).
138. 47 U.S.C.A. § 605.
139. Schwartz v. State of Texas, 344 U.S. 199, 73 Sup. Ct. 232 (1952).

by state law enforcing officers in violation of Section 605 of the Federal Communications Act[140] is admissible in the state courts. In 1961 the United States Supreme Court held in the *Pugnach* case[141] that a federal court will not enjoin a state law enforcing officer from presenting in a state criminal prosecution evidence obtained by wire tapping in violation of the Federal Communications Act.[142]

SEARCH BY A PRIVATE PERSON

It was held by the United States Supreme Court in the *Burdeau* case[143] that a search by a private person, without the knowledge or participation by government officials does not violate the unreasonable search provision of the Fourth Amendment of the Federal Constitution for the reason that this constitutional provision is a protection against governmental action.

THE EXCLUSIONARY RULE

The matter of the admissibility in the federal courts of evidence obtained by unreasonable search was finally settled by the *Weeks* case,[144] which held, in 1914, that such evidence is not admissible in the federal courts.

While a detailed discussion of the *Mapp* case[145] is beyond the scope of this article, mention must necessarily be made that this *Mapp* case, by the application of the right of privacy provision of the Fourth Amendment of the Federal Constitution through the due process clause of the Fourteenth Amendment of such constitution, prevents, upon constitutional grounds, the admissibility in all state courts of evidence obtained through unreasonable search and seizure by law enforcing officers.

---

140. 47 U.S.C.A. § 605.
141. Pugnach v. Dollinger, 365 U.S. 458, 81 Sup. Ct. 650 (1961).
142. 47 U.S.C.A. § 605.
143. Burdeau v. McDowell, 256 U.S. 465, 41 Sup. Ct. 574 (1921); Geniviva v. Bingler, 206 F. Supp. 81 (D.C. Pa. 1961).
144. Weeks v. U.S., 232 U.S. 383, 34 Sup. Ct. 341 (1914). See also Boyd v. U.S., 116 U.S. 616, 6 Sup. Ct. 524 (1886); and People v. Adams, 192 U.S. 585, 24 Sup. Ct. 372 (1904) in connection with the development of the federal exclusionary rule.
145. Mapp v. Ohio, 367 U.S. 643, 81 Sup. Ct. 1684 (1961).

CONCLUSION

A search is reasonable when it is conducted pursuant to a valid search warrant or is made as an incident to a lawful arrest, either with or without a warrant. Some examples of reasonable searches made without a search warrant and not as incidents to a lawful arrest, are those searches made in connection with the investigation of a motor vehicle, or the driver, or for the purpose of checking the driver's license; the stopping of a pedestrian for questioning; the examination of an unconscious person; the investigation of a dwelling by health, housing, or fire inspectors; the checking of vehicles and persons crossing international boundaries; and the investigation of apparently abandoned vehicles.